Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

A.D. ROSATI,

Petitioner In Pro Per,

vs.

COTTMAN TRANSMISSION SYSTEMS, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a nonparty file an appeal from a 28 U.S.C.S. § 1292(a)(1) interlocutory order within 30 days of its entry to vest a Court of Appeals with jurisdiction to hear an appeal of that order?

2. Is an award of attorney fees in a civil contempt proceeding in an amount 20 times the actual damages suffered by a party a per se unreasonable award?

LIST OF PARTIES

Petitioner A.D. Rosati is a nonparty and the Respondent is the plaintiff in the proceedings in the court whose judgment is sought to be reviewed here. The named Defendants in the lower court proceedings are not parties to this Petition. On Petitioner's best information and belief, there is no parent or subsidiary of Respondent to be listed.

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STATEMENT OF JURISDICTION

The Court of Appeals entered its Judgment Order on September 23, 1996 and its Order denying rehearing on October 16, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of 28 U.S.C.S. § 1292(a)(1) is set forth below:

> § 1292. Interlocutory decisions
>
> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the districts courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to modify injunctions, except where a direct review may be had in the Supreme Court;

STATEMENT OF THE CASE

In 1991, Cottman Transmission Systems, Inc., a Pennsylvania corporation (Cottman), was a national franchiser of transmission repair shops with an insignificant presence in the State of Michigan. At that time, A-1 Transmissions, Inc., a Michigan corporation (A-1), had over 30 franchised transmission repair shops in the State of Michigan. A-1 was in financial straits and looking for a purchaser of its business and Cottman seized this opportunity to enter the Michigan market with a significant presence. To avoid problems with creditors of A-1, the acquisition technique involved the mutual termination of the A-1 franchise agreements as of August 25, 1991 and execution of the Cottman franchise agreements on August 26, 1991. Included in Cottman's franchise package was an assignment of the telephone numbers of the corporate Defendants to Cottman. This document is Cottman's justification for seizure of Defendants' telephone numbers by enforcement of the preliminary injunction that issued in this cause.

In signing the former A-1 franchisees to its franchise agreements, Cottman violated the Michigan Franchise Investment Law. This violation afforded the former A-1 franchisees the right to rescind the Cottman franchise agreements and the Defendants rescinded effective April 8, 1992. Cottman filed the within actions in the United States District Court for the Eastern District of Pennsylvania (federal action) shortly thereafter and sought a preliminary injunction primarily directed to removing the assigned telephone numbers from Defendants' shops and transferring them to other Cottman franchisees. At all relevant times, Defendants were represented by Pennsylvania counsel in the federal action.

In June of 1992, Rosati filed an action in the Circuit Court for the County of Wayne, State of Michigan (state action) on

behalf of Defendants against Cottman and Michigan Bell Telephone Company. The relief sought against Michigan Bell was preservation of Defendants' telephone numbers. On July 17, 1992, Cottman secured a preliminary injunction in the federal action. On July 20, 1992, Rosati called Michigan Bell's counsel in the state action to discuss the applicability of the preliminary injunction to the State Action. On July 23, 1992, Rosati learned that Michigan Bell had disconnected Defendants' telephone numbers and was transferring them to other Cottman franchisees. On August 5, 1992, Cottman filed a Motion for Civil Contempt against the Defendants and Rosati alleging a violation of the preliminary injunction by acts impeding Cottman's taking of Defendants' telephone numbers. The federal action concluded on December 22, 1993 with Cottman abandoning its contempt claim against all of the Defendants but preserving its contempt claim against Rosati.

Following a number of adjournments, the contempt hearing was scheduled for June 28, 1995. On May 17, 1995, Rosati filed a Motion to Vacate the Preliminary Injunction. On June 28, 1995, Rosati appeared in the district court for the contempt hearing and was personally served with a copy of the June 28, 1995 Order denying his motion to vacate the preliminary injunction.

The June 28, 1995 hearing consumed approximately three hours. Cottman and Rosati filed proposed findings of facts and conclusions of law and the district court issued its opinion and order on February 2, 1996 finding Rosati in contempt and awarding Cottman damages of $1,358, attorney fees of $9,907.50 and expenses of $494.

On February 23, 1996, Rosati filed his Notice of Appeal from the June 28, 1995 Order denying his motion to vacate the preliminary injunction and the February 2, 1966 Order granting Cottman's motion for civil contempt and awarding Cottman

damages, costs and attorney fees. During oral argument in the Third Circuit Court of Appeals, the panel indicated their belief that it lacked jurisdiction to rule on the June 28, 1995 order. On September 23, 1996, the Third Circuit Court of Appeals entered an Order Affirming the district court's judgment of February 2, 1996. On October 4, 1996, Rosati filed a Petition for Rehearing by the Third Circuit Court of Appeals requesting, *inter alia,* a ruling as to the June 28, 1995 order. On October 16, 1996, Rosati's petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

The Third Circuit Court of Appeals' holding that a nonparty must file an immediate appeal of a 28 U.S.C.S. § 1292(a)(1) interlocutory order to vest it with jurisdiction is in conflict with decisions of three other circuits, *Sierra Club v. Robertson,* 28 F.3d 753, 756, n. 3 (8th Cir. 1994); *Balla v. Idaho State Bd. of Corrections,* 869 F.2d 461, 468 (9th Cir. 1989); and *Retired Chicago Police Ass'n v. City of Chicago,* 7 F.3d 584, 680 (7th Cir. 1993). In addition this holding is contrary to this Court's decision in *Carson v. American Brands, Inc.,* 450 U.S. 79, 85, 101 S. Ct. 993, 997, 67 L. Ed. 2d 59 (1981), which precludes an interlocutory appeal unless the interlocutory order might have a serious, perhaps irreparable consequence and can be effectually challenged only by an immediate appeal. In the case at bar, one telephone call on July 20, 1992 was the only and final contemptuous act of Rosati and the parameters of an action for civil contempt were crystallized. The June 28, 1995 order denying Rosati's motion to vacate the July 17, 1992 Preliminary Injunction clearly could be effectively challenged, consistent with judicial economy, at the time of appealing the final order of February 2, 1996.

This case fairly presents the issue of whether an award of attorney fees disproportionate to the award of damages in a civil

proceeding is unreasonable per se. This Court addressed this issue in *City of Riverside v. Rivera*, 477 U.S. 561, 575, 106 S. Ct. 2686, 2694, 91 L. Ed. 2d 466 (1986) where the majority upheld an award of attorney fees seven times the amount of damages on the grounds that a plaintiff in a civil rights action is also vindicating important civil and constitutional rights that cannot be valued in monetary terms. The within action for damages for civil contempt invokes no such civil or constitutional rights and an award of twenty times the amount of damages is clearly unreasonable. The unreasonableness of the award of attorney fees is further established by the fact that for two and one-half years Cottman wrongfully pursued Lanham Act damages of $24,511 when its actual loss was $496.95.

I.

THE THIRD CIRCUIT COURT OF APPEALS ERRED IN DECLINING TO DETERMINE ROSATI'S APPEAL OF THE JUNE 28, 1995 DISTRICT COURT ORDER DENYING HIS MOTION TO VACATE THE JULY 17, 1992 PRELIMINARY INJUNCTION ON THE APPARENT BELIEF THAT IT LACKED JURISDICTION TO DO SO BECAUSE AN APPEAL OF THAT ORDER WAS NOT FILED WITHIN 30 DAYS OF ITS ENTRY.

It is undisputed that Rosati's status is that of a nonparty as he is neither a party, nor attorney of record, in the federal action. Equally undisputed is the fact that all concerned knew that Rosati was Defendants' attorney in the state action and that Michigan Bell was a party in that action. No one can seriously contend that a potential nonparty is entitled to notice of the hearing for a preliminary injunction, the opportunity to participate in the hearing and present proofs or have a voice in negotiating the terms of the preliminary injunction. The obvious reason is that a preliminary injunction hearing would be a nightmare if every

officer, agent, servant, employee and attorney of a party was deemed to be a necessary participant. While judicial economy may warrant a preliminary injunction hearing with only parties participating, judicial economy does not warrant depriving a nonparty of the right to contest a preliminary injunction and assert any defense a party could have asserted.

United States v. Ryan, 402 U.S. 530, 532-533, 91 S. Ct. 1580, 1582, 29 L. Ed. 2d 85 (1971), confirms the right of a nonparty to utilize a contempt hearing to test the validity of the order underlying the contempt charge:

> We think that respondent's assertion misapprehends the thrust of our cases. Of course, if he complies with the subpoena he will not thereafter be able to undo the substantial effort he has exerted to comply. But compliance is not the only course open to respondent. If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review.

U.S. Catholic Conference v. Abortion Rights, 487 U.S. 72, 76, 108 S. Ct. 2268, 2271, 101 L. Ed. 2d 69 (1988), holds that a nonparty must have the opportunity on the appeal of a civil contempt order to fully test the power of the court to issue the order:

> The right of a nonparty to appeal an adjudication of contempt cannot be

> questioned. The order finding a nonparty witness in contempt is appealable notwithstanding the absence of a final judgment in the underlying action. (citations omitted) Once the right to appeal a civil contempt order is acknowledged, arguments in its legitimate support should not be so confined that the power of the issuing court remains untested.

The right of a nonparty to appeal being absolute, the real question presented is when must a nonparty exercise this right.

The issue involved is the validity of the Preliminary Injunction as enforced against Rosati. Under the principle enunciated in *United Stated v. Ryan,* Rosati can challenge the validity of the Preliminary Injunction at any time during the course of the contempt proceedings. Although an order relating to a Preliminary Injunction is an interlocutory order, 28 U.S.C.S. § 1291 (a) grants the right of an appeal from such an order. This statute, however, does not make an appeal mandatory. *Sierra Club v. Robertson,* 28 F.3d 753, 756, n. 3 (8th Cir. 1994), discusses the discretionary right insofar as when to appeal:

> 3. An order denying a preliminary injunction is immediately appealable as a matter of right under 28 U.S.C.S. § 1292(a)(1) (1988). However, the decision to pursue an immediate appeal is left to the party's discretion, and a party may forgo an interlocutory appeal and instead raise the issue on appeal after final judgment. *Retired Chicago Police Ass'n v. City of Chicago,* 7 F.3d 584, 608 (7th Cir. 1993). There is no suggestion that the issues regarding the Oden

> and Choctaw timber sales have become moot by reason of supervening events. Thus, the judgments denying the requests for preliminary injunctions are properly before us.

Balla v. Idaho State Bd. of Corrections, 869 F.2d 461, 468 (9th Cir. 1989), holds that an unappealed interlocutory order merges in the final judgment and can be challenged in an appeal from the final judgment:

> Our opinion does not foreclose litigants from seeking interlocutory appeals of injunctions under 28 U.S.C.S. § 1292(a), or permissive interlocutory appeals under 28 U.S.C.S. § 1292(b). These options can be exercised before all issues as to all parties have been resolved. Nor are litigants foreclosed from seeking appeals from judgments properly certified under Federal Rule of Civil Procedure 54(b). But when no such appeal is taken from an interlocutory order, "the interlocutory order merges in the final judgment and may be challenged in an appeal from that judgment." *Baldwin v. Redwood City,* 540 F.2d 1360, 1364 (9th Cir. 1976) (footnote omitted), cert denied, 431 US 913, 97 S. Ct 2173, 53 L. Ed. 2d 223 (1977).

Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 680 (7th Cir. 1993), held that a party may forego an interlocutory appeal of an order denying a preliminary injunction and present the issue for appeal after final judgment:

> Although an order denying a preliminary

> injunction is immediately appealable as an interlocutory decision under 28 U.S.C. § 1292(a)(1), an immediate appeal nonetheless is not mandated by the statute. A party may forgo an interlocutory appeal and present the issue for appeal after final judgment. Interlocutory orders therefore may be stored up and raised at the end of the case . . . *Kurowski v. Krajewski,* 848 F.2d 767, 772-773 (7th Cir.), *cert. denied,* 488 U.S. 926, 109 S. Ct. 309, 102 L. Ed. 2d 328(1988). Consequently, the RCPA has not waived its right to appeal the denial of its motion for preliminary injunction.

The Third Circuit Court of Appeals did not determine Rosati's appeal of the June 28, 1995 Order of the district court denying his motion to vacate the July 17, 1992 Preliminary Injunction. During oral argument, it became evident that the Third Circuit Court of Appeals believed that it lacked jurisdiction to hear the appeal of the June 28, 1995 order. Rosati's suggestion that this was an interlocutory order drew a rapid, disbelieving response from a member of the panel. Clearly, the June 28, 1995 order is an interlocutory order by the language of 28 U.S.C. § 1292(a), providing in pertinent part for an appeal as follows:

> § 1292. Interlocutory decisions
>
> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the districts courts of the United States . . . granting, continuing, modifying, refusing or dissolving

> injunctions, or refusing to modify injunctions, except where a direct review may be had in the Supreme Court. . . .

As the right to appeal the June 28, 1995 order is expressly provided for by statute, the obvious explanation for the Third Circuit Court of Appeals refusal to hear this appeal is its belief that it lacked jurisdiction. To clarify this issue, Rosati filed a petition for rehearing in which the court was requested to issue a written opinion to explain the reason for its inaction. The petition for rehearing was denied leaving only speculation as to the reason the Third Circuit Court of Appeals declined to hear Rosati's appeal of the June 28, 1995 order.

If this is the Third Circuit Court of Appeals position, it is contrary to decisions of three other Circuits which support Rosati's contention that he timely filed an appeal of the June 28, 1995 order by filing within the time for appealing the final judgment of February 2, 1996. This position is also contrary to the holding of *Carson v. American Brands, Inc.*, 450 U.S. 79, 85, 101 S. Ct. 993, 997, 67 L. Ed. 2d 59 (1981):

> Unless a litigant can show that an interlocutory order of the district court might have a serious, perhaps irreparable consequence, and that the order can be effectually challenged only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal.

The order denying Rosati's motion to vacate the Preliminary Injunction issued on June 28, 1995, the hearing date for Cottman's contempt motion. If the district court found no contempt on the part of Rosati, or no damages, the issue of an

appeal of the June 28, 1995 order would be moot. Clearly, there was no need for an immediate appeal and Rosati properly waited for final judgment to determine whether an appeal was necessary. And finally, the refusal to hear the appeal of the June 28, 1995 order cannot be condoned under the concept of harmless error.

The thrust of Rosati's motion to vacate the July 17, 1992 Preliminary Injunction was that the district court abused its discretion in granting injunctive relief by failing to:

(a) make the findings of facts and conclusions of law required by Federal Rule of Civil Procedure 52(a);

(b) set forth in the injunction the reasons for its issuance as required by Federal Rule of Civil Procedure 65(d);

(c) require a showing of immediate and irreparable injury and a reasonable probability of eventual success;

(d) abstain from the inferential determination of the disputed issue of fact as to ownership of the telephone numbers in question;

(e) recognize that Appellee's action was one for damages in the amount of unpaid franchise fees for which there was an adequate remedy at law;

(f) apply the doctrine of balancing of conveniences in that to insure Cottman's receipt of its franchise fees of 7 1/2% of Defendants' sales it deprived Defendants of the remaining 92 1/2% of the sales;

(g) maintain the status quo; and

(h) to provide in specific terms and in reasonable detail the act or acts sought to be restrained, as evidenced by the fact that one telephone call to opposing counsel in a pending state action was Appellant's alleged violation of paragraph (3) of the preliminary injunction, which provided as follows:

> that defendant's, acting alone or in concert, combination, or agreement with others, are: . . . (3) enjoined from impeding or interfering with Cottman's right to use, intercept, transfer, or otherwise exercise its rights with respect to the telephone numbers presently appearing under listings or advertisements for "A-1/Cottman" and "Cottman" in telephone directories.

The Third Circuit Court of Appeals erred in declining to hear Rosati's appeal of the June 28, 1995 order and this Court should remand with a directive to that court to hear this appeal.

II.

THE DISTRICT COURT ERRED IN AWARDING ATTORNEY FEES IN A CIVIL CONTEMPT PROCEEDING IN AN AMOUNT TWENTY TIMES THE AMOUNT OF THE ACTUAL LOSS SUFFERED BY COTTMAN.

An award of damages as a sanction for civil contempt is limited by that party's actual loss. *United States v. United Mine Workers of America,* 330 U.S. 258, 304, 67 S. Ct. 677, 701, 91 L. Ed. 884 (1947). The district court found that Rosati impeded the transfer of the telephone numbers for two days and calculated Cottman's damages to be $1,358. This figure was arrived at by multiplying the sales of the Defendants for the two days in the

amount of $6,626 by 7½% for unpaid franchise fees of $496.95 and 13% for uncollected advertising fees of $861.05. Cottman is merely the conduit for passing the advertising fees to the sources providing advertising services for Defendants. Equitable principles preclude an agent from diverting to his personal use funds of his principal given to him to be used for a specific purpose. As Cottman provided no advertising services to Defendants subsequent to the April 8, 1992 rescission, Cottman has no claim for advertising fees subsequent to April 8, 1992. In short the only actual loss to Cottman is franchise fees of $496.95. Nevertheless, the district court awarded Cottman attorney fees of $9,907.50, an amount twenty times the actual loss of Cottman. The Third Circuit Court of Appeals did not see fit to address this issue.

In the first instance, the American rule is that attorney fees are ordinarily not recoverable in the absence of a statute or enforceable contract providing therefore. *Fleischmann Distill. Corp. v. Maier Brewing Cottman,* 386 U.S. 714, 717, 87 S. Ct. 1404, 1407, 18 L. Ed. 2d 475 (1967). Cottman cited no statute authorizing an award of attorney fees for civil contempt.

However, a judicial exception to the American rule has been recognized in a civil contempt action. In a civil contempt action occasioned by willful disobedience of a court order, an award of attorney fees may be authorized as part of the fine levied on the defendant. *Toledo Scale Cottman v. Computing Scale Cottman,* 261 U.S. 399, 426-428, 43 S. Ct. 458, 465-466, 67 L. Ed. 719 (1923). The district court held "the Court finds by clear and convincing evidence that Mr. Rosati disobeyed the Court's preliminary injunction order". This is hardly a finding of willful disobedience to justify an award of attorney fees for civil contempt. Assuming *arguendo* that attorney fees properly lie, the district court abused its discretion in determining the amount of fees to be awarded.

This Court has addressed the issue of a reasonable attorney's fee in a number of cases involving 28 U.S.C.S. § 1988, which provides for an award of reasonable attorney fees to the prevailing party in a civil rights action. The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Hensley v. Eckerhart,* 461 U.S. 424, 434, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d 1310 (1983). Hours that were not reasonably expended must be excluded from the fee calculation, *id.,* at 434-435, 103 S. Ct. at 1939. The extent of a plaintiff's success is a crucial factor in determining the amount of fees to be awarded and, where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained, *id.,* at 441, 103 S. Ct. at 1943.

In the case at bar, Cottman, for a period in excess of three years, pursued a Lanham Act damage claim against Rosati in the amount of $24,511, consisting of infringing sales by Defendants for an eight day period — July 17, 1992 to July 25, 1992. This claim is not warranted by existing law and was rejected by the district court. The district judge elicited the amount of the franchise and advertising fees from counsel for Appellee in the hearing and issued its opinion in which it calculated the actual loss to be $1,358. Under *Hensley,* the district court was obligated to exclude the attorney fees expended on the meritless claim of damages in the amount of the infringing sales of $24,511 and award attorney fees only in relation to the damage award of $495.96. It follows that no attorney fees should be awarded as Cottman never expended legal services to secure the only allowable damages — franchise fees. In fact, attorney fees should be awarded to Rosati under Rule 11 as Cottman's factual claim of eight days of damages lacked evidentiary support and its claim for damages based on infringing sales was not warranted by existing law.

It is fairly obvious that the attorney fees are twenty times the amount of Cottman's actual loss of $496.95. In a case involving § 1988, this Court dealt with the question of whether attorney fees should be proportionate to the amount of damages. Attorney fees seven times the amount of the damage award was upheld in *City of Riverside v. Rivera*, 477 U.S. 561, 575, 106 S. Ct. 2686, 2694, 91 L. Ed. 2d 466 (1986), on the following rationale:

> As an initial matter, we reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued in monetary terms. (Citation omitted) And, Congress has determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff . . ."

Chief Justice Burger in dissent opined:

> I write only to add that it would be difficult to find a better example of legal nonsense than the fixing of attorney's fees by a judge at $245,456.25 for the recovery of $33,350.00.

Id., at 588, 106 S Ct. at 2700. It is respectfully suggested that the case at bar is the better example of legal nonsense in fixing attorney fees.

The case at bar in the final analysis seeks contract damages, measured by the amount of franchise and advertising fees required to be paid by defendants under the terms of their franchise agreement with Cottman. Cottman knew on July 23, 1992 that it was only entitled to damages in the amount of these fees for a two day period and, based on previous sales records, knew that the maximum recovery would be an insignificant amount. The dissent in *City of Riverside, supra,* addressed this situation as requiring "billing judgment":

> And in such a case, where the prospective recovery is limited, it is exactly this "billing judgment" which enables the parties to achieve a settlement; any competent attorney, whether prosecuting or defending a contract action for $10,000, would realize that the case simply cannot justify a fee in excess of the potential recovery on the part of either the plaintiff's or the defendant's attorney. All of these examples illuminate the point made in *Hensley* that "the important factor" in determining a "reasonable" fee is the "results obtained" 461 US at 434, 103 S Ct at 1940. The very "reasonableness" of the hours expended on a case by a plaintiff's attorney necessarily will depend, to a large extent, on the amount that may reasonably be expected to be recovered if the plaintiff prevails.

477 U.S. at 594, 106 S. Ct. at 2704.

As there was a limited possible recovery and no public interest to be served by Cottman's recovery of monetary damages, an award of attorney fees in excess of the amount of damages is per se unreasonable. The unreasonableness is further

illustrated by the fact that Cottman waived its right to proceed against the Defendants for civil contempt damages in December of 1993 but continued to pursue Rosati, the agent of Defendants, for another 18 months to collect an insignificant amount of damages. As the damages were franchise fees and advertising fees required to be paid by Defendants who were benefited by not paying, a conclusion to be drawn is that the legal efforts of Cottman against Rosati were motivated by other than a sincere effort to collect damages.

It is not the function of a court to award attorney fees out of proportion to a possible recovery as this elevates the cause of action to one for attorney fees rather than one to recover damages for a client. The district court clearly abused its discretion in awarding Cottman attorney fees in an amount twenty times the amount of the actual damages.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 16, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1162

COTTMAN TRANSMISSION SYSTEMS, INC.

v.

METRO DISTRIBUTING, INC. d/b/a A-I TRANSMISSIONS OF LIVONIA; ERNEST IAFRATE; GAIL IAFRATE, individually and on behalf of Metro Distributing, Inc. d/b/a A-I Transmissions of Livonia; VIPER TRANSMISSIONS, INC.; RICHARD HAMILTON, individually and on behalf of Viper Transmissions, Inc., MARK CULBERTSON, individually and on behalf of Viper Transmissions, Inc.; T.G.I.W., INC.; ROBERT L. RIEMER, individually and on behalf of T.G.I.W., Inc.; J.P. 1, INC.; JAMES DILLON, individually and on behalf of J.P. 1, INC.; JIM DIXON ENTERPRISES, INC. d/b/a A-1 TRANSMISSIONS OF WESTLAND; JIM DIXON, individually and on behalf of Jim Dixon Enterprises, Inc. d/b/a A-1 Transmissions of Westland; G.G.S., INC. d/b/a A-1 Transmissions; JIM GREGORY, individually and on behalf of G.G.S., Inc., d/b/a A-1 Transmissions; BODNAR, INC.; ANTHONY A. BODNAR, individually and on behalf of Bodnar, Inc.; SNAYYAN, INC.; AHMAD AWAD, individually and on behalf of Snayyan, Inc.; TRI-CONTINENTAL PETROLEUM, Inc.; TIM GAULT, individually and on behalf of Tri-Continental Petroleum, Inc.; JULIANO INC.; FRANK A. JULIANO, individually and on behalf of Juliano, Inc.

(E.D. PA Civil No. 92-cv-02131)

Appendix A

COTTMAN TRANSMISSION SYSTEMS, INC.

v.

CHERRY HILL PRODUCTIONS, INC.; D.M.S., INC. of LANSING; DARRYL SMALL, individually and on behalf of Cherry Hill Productions Inc. and D.M.S. of Lansing; J.B.S. ENTERPRISES, INC.; PHILIP V. VERMIGLIO, individually and on behalf of JBS Enterprises, Inc.; G & I ENTERPRISES; MILTON GREEN, individually and on behalf of G & I Enterprises; PAUL IAFRATE, individually and on behalf of G & I ENTERPRISES

(E.D. PA Civil No. 92-cv-02253)

A.D. Rosati*, *Appellant*
*(pursuant to F.R.A.P. 12(a))

No. 96-1180

COTTMAN TRANSMISSION SYSTEMS, INC.

v.

METRO DISTRIBUTING, INC. d/b/a A-I TRANSMISSIONS OF LIVONIA; ERNEST IAFRATE; GAIL IAFRATE, individually and on behalf of Metro Distributing, Inc. d/b/a A-I Transmissions of Livonia; VIPER TRANSMISSIONS, INC.; RICHARD HAMILTON, individually and on behalf of Viper Transmissions, Inc., MARK CULBERTSON, individually and on behalf of Viper Transmissions, Inc.; T.G.I.W., INC.; ROBERT L. RIEMER, individually and on behalf of T.G.I.W., Inc.; J.P. 1, INC.; JAMES DILLON, individually and on behalf of J.P. 1,

Appendix A

INC.; JIM DIXON ENTERPRISES, INC. d/b/a A-1 TRANSMISSIONS OF WESTLAND; JIM DIXON, individually and on behalf of Jim Dixon Enterprises, Inc. d/b/a A-1 Transmissions of Westland; G.G.S., INC. d/b/a A-1 Transmissions; JIM GREGORY, individually and on behalf of G.G.S., Inc., d/b/a A-1 Transmissions; BODNAR, INC.; ANTHONY A. BODNAR, individually and on behalf of Bodnar, Inc.; SNAYYAN, INC.; AHMAD AWAD, individually and on behalf of Snayyan, Inc.; TRI-CONTINENTAL PETROLEUM, Inc.; TIM GAULT, individually and on behalf of Tri-Continental Petroleum, Inc.; JULIANO INC.; FRANK A. JULIANO, individually and on behalf of Juliano, Inc.

(E.D. PA Civil No. 92-cv-02131)

COTTMAN TRANSMISSIONS SYSTEMS, INC.

v.

CHERRY HILL PRODUCTIONS, INC.; D.M.S., INC. of LANSING; DARRYL SMALL, individually and on behalf of Cherry Hill Productions Inc. and D.M.S. of Lansing; J.B.S. ENTERPRISES, INC.; PHILIP V. VERMIGLIO, individually and on behalf of JBS Enterprises, Inc.; G & I ENTERPRISES; MILTON GREEN, individually and on behalf of G & I Enterprises; PAUL IAFRATE, individually and on behalf of G & I ENTERPRISES

(E.D. PA Civil No. 92-cv-02253)

Cottman Transmission Systems, Inc., *Appellant*

SUR PETITION FOR REHEARING

Appendix A

Present: SLOVITER, *Chief Judge*, COWEN and LEWIS, *Circuit Judges*

The petition for rehearing filed by Appellant A.D. Rosati in the above-entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

s/ D. Sloviter
Chief Judge

Dated: Oct. 16, 1996

APPENDIX B — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 23, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1162

COTTMAN TRANSMISSION SYSTEMS, INC.,

v.

METRO DISTRIBUTING, INC. d/b/a A-I TRANSMISSIONS OF LIVONIA; ERNEST IAFRATE; GAIL IAFRATE, individually and on behalf of Metro Distributing, Inc. d/b/a A-I Transmissions of Livonia; VIPER TRANSMISSIONS, INC.; RICHARD HAMILTON, individually and on behalf of Viper Transmissions, Inc., MARK CULBERTSON, individually and on behalf of Viper Transmissions, Inc.; T.G.I.W., INC.; ROBERT L. RIEMER, individually and on behalf of T.G.I.W., Inc., J.P. 1, INC.; JAMES DILLON, individually and on behalf of J.P. 1, INC.; JIM DIXON ENTERPRISES, INC. d/b/a A-1 TRANSMISSIONS OF WESTLAND; JIM DIXON, individually and on behalf of Jim Dixon Enterprises, Inc. d/b/a A-1 Transmissions of Westland; G.G.S., INC. d/b/a A-1 Transmissions; JIM GREGORY, individually and on behalf of G.G.S., Inc., d/b/a A-1 Transmissions; BODNAR, INC.; ANTHONY A. BODNAR, individually and on behalf of Bodnar, Inc.; SNAYYAN, INC.; AHMAD AWAD, individually and on behalf of Snayyan, Inc.; TRI-CONTINENTAL PETROLEUM, Inc.; TIM GAULT, individually and on behalf of Tri-Continental Petroleum, Inc.; JULIANO INC.; FRANK A. JULIANO, individually and on behalf of Juliano, Inc.

(E.D. PA Civil No. 92-cv-02131)

Appendix B

COTTMAN TRANSMISSION SYSTEMS, INC.

v.

CHERRY HILL PRODUCTIONS, INC.; D.M.S., INC. of LANSING; DARRYL SMALL, individually and on behalf of Cherry Hill Productions Inc. and D.M.S. of Lansing; J.B.S. ENTERPRISES, INC.; PHILIP V. VERMIGLIO, individually and on behalf of JBS Enterprises, Inc.; G & I ENTERPRISES; MILTON GREEN, individually and on behalf of G & I Enterprises; PAUL IAFRATE, individually and on behalf of G & I ENTERPRISES

(E.D. PA Civil No. 92-cv-02253)

A.D. Rosati*, *Appellant*
*(pursuant to F.R.A.P. 12(a))

No. 96-1180

COTTMAN TRANSMISSION SYSTEMS, INC.

v.

METRO DISTRIBUTING, INC. d/b/a A-I TRANSMISSIONS OF LIVONIA; ERNEST IAFRATE; GAIL IAFRATE, individually and on behalf of Metro Distributing, Inc. d/b/a A-I Transmissions of Livonia; VIPER TRANSMISSIONS, INC.; RICHARD HAMILTON, individually and on behalf of Viper Transmissions, Inc., MARK CULBERTSON, individually and on behalf of Viper Transmissions, Inc.; T.G.I.W., INC.; ROBERT L. RIEMER, individually and on behalf of T.G.I.W., Inc.; J.P. 1, INC.; JAMES DILLON, individually and on behalf of J.P. 1,

Appendix B

INC.; JIM DIXON ENTERPRISES, INC. d/b/a A-1 TRANSMISSIONS OF WESTLAND; JIM DIXON, individually and on behalf of Jim Dixon Enterprises, Inc. d/b/a A-1 Transmissions of Westland; G.G.S., INC. d/b/a A-1 Transmissions; JIM GREGORY, individually and on behalf of G.G.S., Inc., d/b/a A-1 Transmissions; BODNAR, INC.; ANTHONY A. BODNAR, individually and on behalf of Bodnar, Inc.; SNAYYAN, INC.; AHMAD AWAD, individually and on behalf of Snayyan, Inc.; TRI-CONTINENTAL PETROLEUM, Inc.; TIM GAULT, individually and on behalf of Tri-Continental Petroleum, Inc.; JULIANO INC.; FRANK A. JULIANO, individually and on behalf of Juliano, Inc.

(E.D. PA Civil No. 92-cv-02131)

COTTMAN TRANSMISSION SYSTEMS, INC.

v.

CHERRY HILL PRODUCTIONS, INC.; D.M.S., INC. of LANSING; DARRYL SMALL, individually and on behalf of Cherry Hill Productions Inc. and D.M.S. of Lansing; J.B.S. ENTERPRISES, INC.; PHILIP V. VERMIGLIO, individually and on behalf of JBS Enterprises, Inc.; G & I ENTERPRISES; MILTON GREEN, individually and on behalf of G & I Enterprises; PAUL IAFRATE, individually and on behalf of G & I ENTERPRISES

(E.D. PA Civil No. 92-cv-02253)

Cottman Transmission Systems, Inc., *Appellant*

Appendix B

On Appeal from the United States District Court for the
Eastern District of Pennsylvania
(D.C. Nos. 92-cv-02131, 92-cv-02253)
District Judge: Hon. Raymond J. Broderick

Argued September 10, 1996

Before: SLOVITER, *Chief Judge*
COWEN and LEWIS, *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court entered February 2, 1996 be and is hereby affirmed. Each party to bear its own costs.

By the Court,

s/ D. Sloviter
Chief Judge

Attest:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

Dated: SEP 23 1996

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED FEBRUARY 2, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 92-2131

COTTMAN TRANSMISSION SYSTEMS, INC.

v.

METRO DISTRIBUTING, INC., ET AL.

-and-

CIVIL ACTION

No. 92-2253

COTTMAN TRANSMISSION SYSTEMS, INC.

v.

CHERRY HILL PRODUCTIONS, INC., ET AL.

ORDER

AND NOW, this 2nd Day of February, 1996; for the reasons set forth in this Court's Memorandum of February 2, 1996;

Appendix C

IT IS ORDERED: Plaintiff's Motion for Civil Contempt against A.D. Rosati, Esq. is GRANTED. A.D. Rosati shall pay compensatory damages to Cottman Transmission Systems, Inc. in the amount of $1,358.00 and shall pay attorneys' fees and costs to Cottman Transmission Systems, Inc. in the amount of $10,402.00.

s/ Raymond J. Broderick
Raymond J. Broderick, J.

APPENDIX D — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED FEBRUARY 2, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 92-2131

COTTMAN TRANSMISSION SYSTEMS, INC.

V.

METRO DISTRIBUTING, INC., ET AL.

and

CIVIL ACTION
No. 92-2253

COTTMAN TRANSMISSION SYSTEMS, INC.

v.

CHERRY HILL PRODUCTIONS, INC. ET AL.

MEMORANDUM

Broderick, J. February 2, 1996

Before the Court is Cottman Transmission, Inc.'s ("Cottman") motion for civil contempt against A.D. Rosati, Esquire ("Mr. Rosati"), defendants' Michigan attorney, for

violating this Court's preliminary injunction order of July 17, 1992. A hearing was held on June 28, 1995 to determine whether Mr. Rosati had engaged in a pattern of conduct to violate the preliminary injunction and whether the Court should hold Mr. Rosati in contempt for failing to appear for previously scheduled contempt hearings.

For the reasons set forth below, the Court finds Mr. Rosati in civil contempt for violating the Court's preliminary injunction of July 17, 1992 and will order him to pay Cottman compensatory damages in the amount of $1358.00 and attorneys' fees and costs in the amount of $10,402.00.

I. BACKGROUND

The complicated history of this litigation is set forth at length in this Court's Memoranda of October 5, 1992 and December 22, 1993. A condensed version follows.

Cottman, a Pennsylvania corporation, is a nationwide franchisor of automotive transmission repair businesses. Defendants are Michigan corporations and corporate officers of the defendant corporations and citizens of Michigan. Defendants operate automotive transmission repair shops in central and southeastern Michigan. A-1 Transmissions, Inc. is a non-party franchisor of automotive transmission repair shops in Michigan.

In Summer 1991, Cottman and A-1 entered into an agreement granting Cottman the exclusive use of the "A-1 Transmission" mark in Michigan and giving Cottman the right to convert existing A-1 franchises into Cottman franchises. In August 1991, each defendant entered into a licensing agreement

with Cottman and a related agreement terminating its A-1 franchise. In March 1992, because Cottman had failed to comply with certain provisions of Michigan law, it offered to rescind the licensing agreements. On April 6, 1992, all defendants accepted Cottman's offer of rescission, effective Wednesday, April 8, 1992. Cottman responded that defendants' purported rescissions were invalid on several grounds and advised them that unless the deficiencies were cured, Cottman considered the License Agreements to be valid and expected defendants to continue to operate pursuant to the terms of those agreements. On or about April 9, 1992, defendants ceased operating as A-1, A-1 Cottman or Cottman transmission centers and began operating competing transmission repair facilities.

On or about April 10, 1992, Cottman instituted litigation in this Court against defendants alleging that they had conspired to violate Cottman's exclusive right to use the "A-1 Transmission" trademark and the "Cottman" trademark in Michigan. Cottman also alleged that defendants were exploiting the goodwill of the Cottman mark and causing confusion as to the origin of the services provided by defendants.

On July 14, 1992, this Court held a hearing on Cottman's request for a preliminary injunction. On the basis of the evidence presented at that hearing, this Court issued a preliminary injunction on July 17, 1992, which provided in relevant part:

> that defendants, acting alone or in concert, combination, or agreement with others, are: . . . (3) enjoined from impeding or interfering with Cottman's right to use, intercept, transfer, or otherwise exercise its rights with respect to the telephone numbers presently

appearing under listings or advertisements for "A-1/Cottman" and "Cottman" in telephone directories.

On August 8, 1992, Cottman filed a civil contempt motion alleging that the defendants and their Michigan attorney, Mr. Rosati had engaged in a pattern of conduct which violated ¶ 3 of the preliminary injunction. Specifically, Cottman asserted that the defendants and Mr. Rosati had tried to prevent Michigan Bell from implementing Cottman's order to transfer phone numbers listed under "A-1/Cottman" in telephone directories to Cottman locations and had filed an action in Michigan state court against Michigan Bell seeking relief contradicting this Court's preliminary junction.

After a contempt hearing on September 17, 1992, for which Mr. Rosati did not appear, the Court found defendant Robert Reimer in contempt of paragraph 3 of the preliminary injunction for, on July 27, 1992, ordering two telephone numbers listed in the Yellow Pages under "A-1/Cottman Transmission Centers" disconnected. By Order of October 6, 1992, the Court continued the hearing as to A.D. Rosati and the other defendants to December 14, 1992 at which time they were to show cause why they should not be held in contempt of the Court's preliminary injunction. Cottman served a copy of the October 6, 1992 scheduling order on Mr. Rosati.

In December, 1992, most of the defendants filed for bankruptcy and the Court placed these actions in civil suspense pursuant to the automatic stay triggered by the bankruptcies. The Court postponed the contempt hearing scheduled for December 14, 1992. In the fall of 1993, after the case was removed from civil suspense, the parties engaged in a series of

negotiations which eventually culminated in settlements with most of the defendants in November of 1993. The remaining defendants consented to an entry of default judgment.

Cottman advised the Court by letter dated January 18, 1994 that it still intended to pursue the contempt motion against Mr. Rosati. A contempt hearing was scheduled several times and finally took place on June 28, 1995.

I. Findings of Fact

Based on the "clear and convincing" evidence presented at the contempt hearing, the Court makes the following findings of fact:

As set forth above, on July 17, 1992, after a hearing, this Court entered a preliminary injunction which provided in relevant part:

> that defendants, acting alone or in concert, combination, or agreement with others, are: . . . (3) enjoined from impeding or interfering with Cottman's right to use, intercept, transfer, or otherwise exercise its rights with respect to the telephone numbers presently appearing under listings or advertisements for "A-1/Cottman" and "Cottman" in telephone directories.

Mr. Rosati is an attorney licensed to practice in the States of Michigan and Ohio. He represented the defendant franchisees in a series of lawsuits against Cottman in Michigan beginning in 1992. Although he never entered an appearance in the this

Court, he retained local counsel, assisted local counsel in developing a defense strategy, and kept fully apprised of the status of the litigation. Mr. Rosati admits that he received notice of the preliminary injunction order when he was faxed a copy the day it was entered, Friday, July 17, 1992.

Cottman also received a copy of the preliminary injunction on Friday, July 17, 1992 and faxed a copy to Michigan Bell. At approximately 3:30 p.m. on July 17, 1992, Cottman directed Michigan Bell to transfer approximately seventeen phone numbers listed in the Yellow Pages under "A-1/Cottman" to other Cottman locations in the Detroit area. Cottman faxed typed instructions to Michigan Bell which listed the numbers to be transferred and the new locations for each number. Prior to July 17, 1992, Michigan Bell had consistently refused the parties' requests to change the status of any of the phone numbers at issue in the *Cottman* litigation without a court order. After reviewing the preliminary injunction order on July 17, 1992, however, Michigan Bell's attorneys determined that it authorized them to execute Cottman's transfer request.

Michigan Bell usually implements a transfer order within one to two business days after the order is placed. Service order numbers confirming the request are ordinarily issued the same day the customer places the order. Cottman's transfer request should have been completed by close of business on Tuesday, July 21, 1992. In this case, however, Michigan Bell did not issue service order numbers until late July 22, 1992 or July 23, 1992, and the transfers were not completed until July 24, 1992. The transfer of the numbers was delayed, therefore, by two business days — July 22 and July 23, 1992. During these two days, customers calling the phone numbers in question continued to reach the defendant franchisees.

Appendix D

A substantial factor in causing the two-day delay in transferring the numbers was pressure Mr. Rosati placed on Michigan Bell to disregard the preliminary injunction order. Mr. Rosati believed that the preliminary injunction order did not apply to Michigan Bell because Michigan Bell was not a party to the litigation, and that it did not authorize Michigan Bell to transfer phone numbers listed "A-1 Cottman" in the Yellow Pages. He also believed that the injunction did not clearly define Cottman's rights to the numbers. Mr. Rosati never sought clarification of the preliminary injunction in this Court.

Instead, beginning on July 17, 1992, Mr. Rosati began calling Michigan Bell's attorneys in an effort to prevent the transfer of the phone numbers. Between July 17, 1992 at 8:25 a.m. and July 23, 1992, he placed ten calls to Michigan Bell — three on July 17th; three on July 20th; one on July 21st; two on July 22nd; and one on July 23rd. Mr. Rosati did not actually reach Charles Anderson, an attorney for Michigan Bell, until July 20, 1992 at which time he expressed his opinion that the preliminary injunction did not apply to Michigan Bell and urged him to disregard the order. He actually spoke to Mr. Anderson at least one or two other times between July 20 and July 23, 1992. By making these phone calls in an effort to delay or prevent Michigan Bell from implementing Cottman's order, Mr. Rosati impeded and interfered with Cottman's right to use and transfer the telephone numbers appearing under listings or advertisements for "A-1/Cottman".

During the period of time in which Mr. Rosati was attempting to dissuade Michigan Bell from executing the transfer, defendants were trying to establish new phone numbers. It was to the defendants advantage to delay the transfer of the phone numbers until they established new numbers.

Appendix D

On July 24, 1992, Mr. Rosati again called Charles Anderson to complain that certain numbers had been transferred in error. Mr. Anderson insisted on holding a conference call with Mr. Rosati and Todd Leff, counsel for Cottman in this Court, to resolve the issue. They determined that none of the numbers had been transferred in error.

On July 17, 1992, after this Court entered its injunction, Mr. Rosati filed on action on behalf of defendants against Michigan Bell in Michigan State Court in which he sought a temporary restraining order and a preliminary injunction directing Michigan Bell to maintain the status quo as to the telephone numbers in question until further order of the Michigan State Court. The request for a temporary restraining order and preliminary injunction was in direct violation of this court's injunction. No temporary restraining order or preliminary injunction was issued by the Michigan State Court. Furthermore, there is no evidence that this lawsuit delayed the transfer of the numbers.

During the four weeks prior to the transfer of the numbers, the defendants average gross sales were $55,491.00, or $9248.00 per day (calculation based on a six day business week). During the four weeks following the transfer of the numbers, the defendants' average gross sales were $35,607.00, or $5,935.00 per day. During the two days in which the phone numbers continued to ring in the defendants' centers, the defendants conducted an average of $6,626.00 in additional gross sales. Thus the loss of sales on which Cottman was entitled to 20.5% royalties and advertising fee was $6,626.00. Cottman would have received a royalty and advertising fee in the amount of $1,358.00. The Court finds that Cottman sustained a loss of $1358.00 as a result of Mr. Rosati's contempt.

Appendix D

Mr. Rosati failed to appear for contempt hearings scheduled for September 17, 1992 and November 22, 1993. Mr. Rosati is therefore in contempt for failure to appear or provide the Court with an acceptable reason for his failure to appear.

II. Conclusions of Law

As a threshold matter, and as the Court made clear in its Order of March 17, 1995 scheduling the contempt hearing for June 28, 1995, this is an action for civil and not criminal contempt in that Cottman seeks reimbursement for losses sustained as a result of Mr. Rosati's contempt and not a punitive sanction. In a recent exploration of the distinction between criminal and civil contempt, the Supreme Court affirmed the longstanding principle that "whether a contempt is civil or criminal turns on the 'character and purpose' of the sanction involved. Thus, a contempt sanction is considered civil if it 'is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.' " *International Union v. Bagwell,* 114 S.Ct. 2552, 2557 (1994), *quoting Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 441, 31 S.Ct. 492, 498 (1911).

An injunction binds not only the enjoined parties but also non-parties who act with the enjoined parties, *see Regal Knitwear Co. v. National Labor Rel. Bd.,* 324 U.S. 9, 14, 65 S.Ct. 478, 481 (1945), and an injunction issued by a federal district court is nationwide in scope. *See Leman v. Krentler-Arnold Hinge Last Co.,* 284 U.S. 448, 451, 52 S.Ct. 238, 240 (1932); *Waffenschmidt v. Mackay,* 763 F.2d 711, 716 (5th Cir. 1985), *cert. denied, Currey v. Waffenschmidt,* 474 U.S. 1056, 106 S.Ct. 794 (1986). Under Federal Rule of Civil Procedure 65(d), an injunction is binding upon the "parties to the action,

their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." A non-party may be held in contempt of a preliminary injunction order if "he or she has actual knowledge of a court's order and either abets the defendant or is legally identified with him." *Quinter v. Volkswagen of America,* 676 F.2d 969, 972 (3d Cir. 1982).

The Court finds that Mr. Rosati was bound by the Court's July 17, 1992 preliminary injunction. He was counsel for the defendants in the State of Michigan and was responsible for retaining local counsel in this litigation. Although he was not a party to the action in this Court, nor did he enter an appearance, there is no question that as defendants' Michigan counsel, he had actual knowledge of the proceedings in this litigation. As he admitted at the contempt hearing on June 28, 1995, he received a copy of the preliminary injunction order on the very day it was entered.

To establish liability for civil contempt, the moving party must prove three elements by clear and convincing evidence: "(1) that a valid order of the court existed; (2) that the defendants had knowledge of the order; and (3) that the defendants disobeyed the order." *Roe, et al. v. Operation Rescue,* 54 F.3d 133, 137 (3d Cir. 1995). Wilfulness is not an element of civil contempt. *McComb v. Jacksonville Paper Co.,* 336 U.S. 187, 191, 69 S.Ct. 497, 499 (1949); *Waste Conversion v. Rollins Environmental Services,* 893 F.2d 605, 609 (3d Cir. 1990).

The Court finds by clear and convincing evidence that a valid order existed. Moreover, as the United States Supreme Court has recently underscored in *Celotex Corp. v. Edwards,*

115 S.Ct. 1493 (1995), *quoting GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 386, 100 S.Ct. 1194, 1201 (1980), " 'persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed even if they have proper grounds to object to the order." Moreover, "the validity of the order may not be collaterally challenged in a contempt proceeding for violating the order." *Roe v. Operation Rescue,* 919 F.2d 857, 871 (3d Cir. 1990).

As set forth above, the Court also finds by clear and convincing evidence that Mr. Rosati had actual notice of the Court's preliminary injunction order of July 17, 1992. Finally, based on its findings of fact as heretofore set forth, the Court finds by clear and convincing evidence that Mr. Rosati disobeyed the Court's preliminary injunction order. Thus, Mr. Rosati is in civil contempt of the Court's July 17, 1992 preliminary injunction.

This Court has broad discretion to fashion an appropriate civil contempt remedy. *Woods v. Woods,* 28 F.3d 396, 399 (3d Cir. 1994); *Northeast Women's Center v. McMonagle,* 939 F.2d 57, 70 (3d Cir. 1991). The appropriate civil contempt sanction should compensate the moving party for actual losses sustained as a result of the contempt. *See McDonald's Corp. v. Victory Investments,* 727 F.2d 82, 87 (3d Cir. 1984).

As the Court heretofore found, the appropriate civil contempt remedy in this case is compensatory damages in the amount of $1,358.00. The Court also finds that Cottman is entitled to attorneys' fees and costs in the amount of $10,402.00.

The Third Circuit has made it clear that "attorney's fees may be awarded for litigation activity of in-house counsel who

has entered an appearance and played an active role in handling the litigation." *Delaware Valley Citizens' Council v. Com. of Pa.*, 762 F.2d 272, 278. There is no question that Mr. Leff and associate counsel at Cottman entered appearances and actively represented Cottman before this Court in this litigation.

Cottman has requested a total of $20,063.00 in attorneys' fees. Cottman seeks reimbursement for 94.5 hours for Todd Leff based on an hourly rate of $175.00 and 23.5 hours for associate counsel based on an hourly rate of $150.00. The Court has determined that the hourly rates requested by Cottman are reasonable.

The Court has also determined, however, that Cottman is entitled to be reimbursed for only 46.8 hours for Todd Leff ($8,190.00) and 10.95 hours for associate in-house counsel ($1,642.50) for a total of $9,832.50. The Court has reduced Cottman's request to reflect the fact that the contempt motion was originally brought and litigated against all the defendants and Mr. Rosati. A settlement was reached with the defendants in late November, 1993, thereby terminating this litigation and the contempt as to the defendants. As heretofore pointed out, the settlement did not terminate Cottman's contempt motion as to Mr. Rosati. The Court has determined that Mr. Rosati's share of Cottman's fees prior to the termination of the litigation is 7.1% and that his share after the settlement was reached with the defendants is 100%. Likewise, the court will reduce the fees sought by Cottman for its Michigan attorneys from $1,053.00 to $75.00. Finally, Cottman is also entitled to be compensated for expenses in the amount of $494.00.

An appropriate Order follows.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED JUNE 28, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 92-2131

COTTMAN TRANSMISSION SYSTEMS, INC.

v.

METRO DISTRIBUTING, INC., ET AL.

-and-

CIVIL ACTION

No. 92-2253

COTTMAN TRANSMISSION SYSTEMS, INC.

v.

CHERRY HILL PRODUCTIONS, INC., ET AL.

ORDER

AND NOW, this 27th day of June, 1995; A.D. Rosati having filed a Motion to Vacate the Court's July 17, 1992 Preliminary Injunction Order on the grounds that the record from the preliminary injunction hearing shows that Cottman failed to

establish irreparable injury or reasonable probability of eventual success on the merits; Cottman having filed a Motion for Sanctions against Mr. Rosati for filing said Motion to Vacate in violation of Fed. Rule Civ. Proc. 11; A.D. Rosati having also filed a Motion to Strike Cottman's Claim for Compensatory Damages on the ground that Plaintiffs' objected to some of Mr. Rosati's interrogatories and provided non-responsive answers to others; the Court having considered all of the above motions;

IT IS ORDERED: A.D. Rosati's Motion to Vacate the Court's July 17, 1992 Preliminary Injunction is DENIED.

IT IS FURTHER ORDERED: Cottman's Motion for Sanctions against Mr. Rosati for filing said Motion to Vacate in violation of Fed. Rule Civ. Proc. 11 is DENIED.

IT IS FURTHER ORDERED: A.D. Rosati's Motion to Strike Cottman's Claim for Compensatory Damages is DENIED.

s/ Raymond J. Broderick
Raymond J. Broderick, J.